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# Jayakumar a/l Rajoo Mohamad v CIMB Aviva Takaful Bhd

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02–2926–12 OF 2012
ZAWAWI SALLEH, IDRUS HARUN AND VERNON ONG JJCA
3 DECEMBER 2014

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*Insurance — Motor insurance — Policy of insurance — Application by insurer to declare policy void and unenforceable — Non-disclosure of fact that insured passed away when insurance policy renewed — Whether insurance rendered void and unenforceable — Meaning of words 'date the liability was incurred' in s 96(3) of the Road Transport Act 1987 — Whether means date when judgment is obtained — Judgment not obtained when application for declaration filed by insurer — Whether insurer entitled to the benefit of the declaration — Road Transport Act 1987 s 96(3)*

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E

*Statutory Interpretation — Construction of statute — Intention of Parliament — Natural and ordinary meaning — Whether court bound to enforce meaning even if result caused was inconvenient, impolite or improbable*

F

*Statutory Interpretation — Construction of statutes — Rules of construction — Plain and ordinary meaning of words to be adopted — Court not to re-write statute — Purposive approach in construing meaning of ambiguous words — Intent of Legislature to be given effect*

G

The respondent was a licensed Takaful insurance company pursuant to the Takaful Act 1984. On 25 June 2007, the respondent issued a Takaful motor insurance policy in respect of a motor car bearing registration number MG 7515. The insured was stated as one 'Wan Abdullah bin Wan Ahmad Tajuddin' ('the insured'). The period of the insurance commenced on 25 June 2007–24 June 2008. On 28 September 2007 motor car MG 7515 had collided into the

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appellant's motorcycle causing injuries to the appellant. Investigations by the respondent revealed that the insured had passed away on 19 August 2004. The insured's sister-in-law had taken over possession of motor car MG 7515 after the insured's demise and had continued renewing the insurance in the name of the insured. The respondent thus applied to the High Court ('the proceedings')

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for a declaration that the insurance was void and unenforceable on the ground of non-disclosure of the material fact that the insured had already passed away at the time of the application for the renewal of the insurance. The appellant's application to intervene in the proceedings was allowed. The High Court held that the insurance was void and unenforceable pursuant to s 96(3) of the Road

Transport Act 1987 ('the RTA 1987'). The appellant appealed against the decision of the High Court. The principal issue that fell to be determined was whether the date the liability was incurred was the date of the accident or the date when judgment on liability was pronounced?

**Held,** dismissing the appeal with no order as to costs:

(1) In construing any statutes, the court will firstly, look at the words in the legislation and apply the plain and ordinary meaning of the words in the statute. If there is any ambiguity to the words used, the court is duly bound to accept it even if it may lead to mischief. But where the language used is clear and unambiguous, it is not the function of the court to re-write the statute in a way which it considers reasonable. But if the words employed are not clear, then the court may adopt the purposive approach in construing the meaning of the words used (see para 21).

(2) The fundamental rule of interpretation is that a statute is to give effect to the intent of the Legislature, and that intention has to be found by an examination of the language used in the statute as a whole. Where the Legislature uses different language in the same connection, in different parts of the statute, it is presumed that a different meaning and effect is intended, and if different language is used in contiguous provisions, it must be presumed to have done so designedly. Where the statute has an ordinary and natural meaning, the court has a duty to enforce that meaning even if the result is inconvenient, impolite or improbable; *Manokaram a/l Subramaniam v Ranjid Kaur a/p Nata Singh* [2009] 1 MLJ 21 referred (see para 22).

(3) The words 'the date the liability was incurred' in s 96(3) of the RTA 1987 is not defined in the RTA 1987. As a starting point, the proviso to the subsection should be read together with the subsection. Subsection (3) provides that the insurer shall not be liable to pay any sums if 'before the date the liability was incurred' the insurer has obtained a declaration from a court. The proviso to sub-s (3) provides that the insurer will still be liable if the application for the declaration was only made after judgment was obtained. A reading of the proviso clearly advances the meaning of 'the date the liability was incurred' and which date is the date when judgment is obtained (see paras 24 & 26).

(4) In a running down action, the plaintiff's claim for damages is based on the tort of negligence. Prior to the trial of the action, liability in damages has not yet been incurred. What the plaintiff has is a cause of action in negligence which, if proven, will subject the defendant to liability in damages. Therefore, 'the date liability is incurred' within the meaning of sub-s (3) must be held to have the meaning that liability is only incurred when judgment on liability is pronounced by a court after full trial (see para 28).

(5) In this instant case, no judgment had been obtained. When the application for the declaration by the respondent was filed, there was no judgment. As such, the proviso did not apply to deny the respondent of the benefit of the declaration it had obtained. Consequently, the respondent was entitled to the benefit of the declaration obtained pursuant to s 96(3) of the RTA 1987; *Kurnia Insurans (M) Bhd v Nik Mohd Faizul bin Nik Mustafa & Anor* [2013] 9 MLJ 675 not followed (see paras 29–30).

**[Bahasa Malaysia summary**

Responden merupakan syarikat insurans Takaful berlesen menurut Akta Takaful 1984. Pada 25 Jun 2007, responden telah mengeluarkan polisi insurans motor Takaful berkaitan kereta yang mempunyai nombor pendaftaran MG 7515. Orang yang diinsuranskan dinyatakan sebagai 'Wan Abdullah bin Wan Ahmad Tajuddin' ('orang yang diinsuranskan'). Tempoh insurans itu bermula pada 25 Jun 2007–24 Jun 2008. Pada 28 September 2007 kereta MG 7515 telah berlanggar dengan motorsikal perayu yang menyebabkan kecederaan kepada perayu. Siasatan oleh responden menunjukkan bahawa orang yang diinsuranskan telah meninggal dunia pada 19 Ogos 2004. Kakak ipar orang yang diinsuranskan telah mengambil alih milikan kereta MG 7515 selepas kematian orang yang diinsuranskan itu dan meneruskan untuk memperbaharui insurans atas nama orang yang diinsuranskan. Responden dengan itu telah memohon Mahkamah Tinggi ('prosiding itu') untuk deklarasi bahawa insurans itu tidak sah dan tidak boleh dikuat kuasakan atas alasan ketidakdedahan fakta penting orang yang diinsuranskan itu telah pun meninggal dunia pada masa permohonan untuk pembaharuan insurans itu. Permohonan perayu untuk campur tangan dalam prosiding itu telah dibenarkan. Mahkamah Tinggi memutuskan bahawa insurans itu adalah tidak sah dan tidak boleh dikuatkuasakan menurut s 96(3) Akta Pengangkutan Jalan 1987 ('APJ 1987'). Perayu telah merayu terhadap keputusan Mahkamah Tinggi. Isu utama yang perlu ditentukan adalah sama ada tarikh liabiliti terakru adalah tarikh kemalangan atau tarikh apabila penghakiman berhubung liabiliti diisytiharkan?

**Diputuskan,** menolak rayuan tanpa perintah untuk kos:

(1) Dalam mentafsir apa-apa statut, mahkamah terlebih dahulu akan melihat perkataan-perkataan dalam perundangan dan menerima pakai maksud yang jelas dan biasa perkataan-perkataan dalam statut itu. Jika terdapat apa-apa ketaksaan kepada perkataan-perkataan yang digunakan, mahkamah adalah terikat untuk menerimanya meskipun ia boleh membawa kepada suatu bersifat jahat. Namun di mana bahawa yang digunakan adalah jelas dan tidak taksa, ia bukan fungsi mahkamah untuk menulis semula statut itu dalam cara yang dianggapnya munasabah. Namun jika perkataan-perkataan yang digunakan itu tidak jelas, maka

mahkamah boleh menggunakan pendekatan bertujuan dalam mentafsir maksud perkataan-perkataan yang digunakan (lihat perenggan 21).

(2) Peraturan asas tafsiran ialah di mana undang-undang adalah untuk melaksanakan niat badan perundangan, dan niat yang perlu didapati dengan penelitian bahasa yang digunakan dalam undang-undang tersebut secara keseluruhannya. Di mana badan perundangan menggunakan bahasa yang berbeza berkaitan yang sama, dalam bahagian yang berlainan statut itu, adalah dianggap bahawa maksud dan kesan yang berbeza adalah dimaksudkan, dan jika bahasa yang berbeza digunakan dalam peruntukan berkaitan, ia mesti dianggap telah berbuat demikian dgn maksud yg tertentu. Di mana statut itu mempunyai maksud biasa dan semula jadi, mahkamah mempunyai tanggungjawab untuk menguatkuasakan maksud itu walaupun hasilnya adalah menyusahkan, kurang sopan atau tidak berkemungkinan; *Manokaram a/l Subramaniam v Ranjid Kaur a/p Nata Singh* [2009] 1 MLJ 21 dirujuk (lihat perenggan 22).

(3) Perkataan-perkataan 'the date the liability was incurred' dalam s 96(3) APJ 1987 tidak ditafsirkan dalam APJ 1987. Sebagai permulaan, proviso kepada subseksyen yang perlu dibaca bersama-sama dengan subseksyen itu. Subseksyen (3) memperuntukkan bahawa syarikat insurans tidak akan bertanggungjawab untuk membayar apa-apa jumlah wang yang jika 'before the date the liability was incurred' orang yang diinsuranskan telah memperoleh deklarasi daripada mahkamah. Proviso kepada sub-s (3) memperuntukkan bahawa orang yang diinsuranskan masih bertanggungjawab jika permohonan untuk deklarasi hanya dibuat selepas penghakiman diperoleh. Satu bacaan proviso jelas menunjukkan maksud 'the date the liability was incurred' dan tarikh yang mana adalah tarikh apabila tarikh itu diperoleh (lihat perenggan 24 & 26).

(4) Dalam tindakan perlanggaran, tuntutan plaintif untuk ganti rugi adalah berdasarkan tort kecuaian. Sebelum perbicaraan untuk tindakan itu, liabiliti dalam ganti rugi masih belum dilakukan. Apa yang plaintif ada ialah kausa tindakan dalam kecuaian yang, jika dibuktikan, akan menyebabkan defendan tertakluk kepada liabiliti dalam ganti rugi. Oleh itu, 'the date the liability was incurred' dalam maksud sub-s (3) hendaklah diputuskan sebagai mempunyai maksud bahawa liabiliti itu hanya terakru apabila penhakiman berhubung liabiliti diisytiharkan oleh mahkamah selepas perbicaraan penuh (lihat perenggan 28).

(5) Dalam kes ini, tiada penghakiman telah diperoleh. Apabila permohonan untuk deklarasi oleh responden telah difailkan, tidak terdapat apa-apa penghakiman. Oleh itu, proviso itu tidak terpakai untuk menafikan responden untuk faedah berhubung deklarasi yang telah diperolehinya. Berikutan itu, responden berhak mendapat faedah deklarasi yang diperoleh itu menurut s 96(3) APJ 1987; *Kurnia Insurans (M) Bhd v Nik*

*Mohd Faizul bin Nik Mustafa & Anor* [2013] 9 MLJ 675 tidak diikut (lihat perenggan 29–30).]

**Notes**

For a case on intention of Parliament, see 11(2) *Mallal's Digest* (5th Ed, 2015) para 1852.

For cases on policy of insurance, see 8(1) *Mallal's Digest* (5th Ed, 2015) paras 445–448.

For cases on rules of construction, see 11(2) *Mallal's Digest* (5th Ed, 2015) paras 2080–2108.

**Cases referred to**

*Andrew Lee Siew Ling v United Overseas Bank (M) Bhd* [2013] 1 MLJ 449, FC (refd)

*Barnett v King* [1891] 1 Ch 4, CA (refd)

*Chin Choy & Ors v Collector of Stamp Duties* [1979] 1 MLJ 69, FC (refd)

*Ellis v Pond and The Bloomsbury Syndicate* [1898] 1 QB 426, CA (refd)

*Kurnia Insurans (M) Bhd v Nik Mohd Faizul bin Nik Mustafa & Anor* [2013] 9 MLJ 675; [2013] 1 LNS 40, HC (not folld)

*Littlewood v George Wimpey & Co Ltd British Overseas Airways Corporation (second defendants and third parties)* [1953] 2 All ER 915, CA (refd)

*Manokaram a/l Subramaniam v Ranjid Kaur a/p Nata Singh* [2009] 1 MLJ 21, FC (refd)

*Magor and St Mellons Rural District Council v Newport Corporation* [1952] AC 189, HL (refd)

*Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd* [2002] 1 MLJ 385; [2002] 1 CLJ 645, FC (refd)

*Metramac Corp Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd* [2006] 4 MLJ 113, FC (refd)

*NKM Holdings Sdn Bhd v Pan Malaysia Wood Bhd* [1987] 1 MLJ 39, SC (refd)

*PP v Tan Tatt Eek & other appeals* [2005] 2 MLJ 685; [2005] 1 CLJ 713, FC (refd)

*Sri Bangunan Sdn Bhd v Majlis Perbandaran Pulau Pinang & Anor* [2007] 6 MLJ 581, FC (refd)

*Tahan Insurance Malaysia Bhd v Ong Choo Tian @ Eng Choo Tian & Anor* [2004] 6 MLJ 367; [2004] 7 CLJ 270, HC (refd)

*Vengadasalam v Khor Soon Weng & Ors* [1985] 2 MLJ 449, SC (refd)

*Warburton v Loveland d Ivie* (1832) 2 Dow & CI 480, HL (refd)

*Wolmershausen v Gullick* [1893] 2 Ch 514, Ch D (refd)

*Woodward v Watts* (1853) 2 E & B 452 (refd)

*Yeo Peck Chie v KS Gill & Co* [1946] 1 MLJ 131 (refd)

**Legislation referred to**

Interpretation Acts 1948 and 1967 s 17A
Road Transport Act 1987 s 96(1), (2), (3)
Takaful Act 1984

**Appeal from:** Originating Summons No 24–2615–10 of 2011 (High Court, Shah Alam)

*R Siva Raja (Sivaraja & Co) for the appellant.*
*Mohd Zaini bin Marzuki (Aznur Mazwin & Assoc) for the respondent.*

**Vernon Ong JCA:**

INTRODUCTION

**[1]** This appeal relates to a declaration of the High Court that a Takaful motor insurance is void and unenforceable pursuant to s 96(3) of the Road Transport Act 1987 ('the RTA 1987'). After hearing submissions of counsel of the parties, we dismissed the appeal. We now give our grounds for dismissing the appeal.

BRIEF ACCOUNT OF THE SALIENT FACTS

**[2]** CIMB Aviva Takaful Bhd ('the respondent') was a licensed Takaful insurance company pursuant to the Takaful Act 1984.

**[3]** On 25 June 2007, the respondent issued a Takaful motor insurance policy in respect of a motor car model Ford Escort bearing registration number MG 7515. The insured was stated as one 'WAN ABDULLAH BIN WAN AHMAD TAJUDDIN' ('the insured'). The period of the insurance commenced on 25 June 2007–24 June 2008.

**[4]** On or about 29 November 2007, the respondent received a notice of commencement of proceedings pursuant to s 96(2) of the RTA 1987 from the solicitors for the appellant. According to the notice, on 28 September 2007 whilst the appellant was lawfully riding on motorcycle bearing registration number WFJ 786, motor car MG 7515 driven by the insured collided into the said motor cycle thereby causing injuries to the appellant.

**[5]** Investigations carried out by the respondent revealed that the insured had passed away on 19 August 2004.

**[6]** The respondent then filed an application to the High Court ('the proceedings') for a declaration that the insurance is void and unenforceable on

the ground of non-disclosure of the material fact that the insured had already passed away at the time of the application for the renewal of the insurance.

**[7]** Meanwhile, on 14 July 2009, the appellant had filed an action at the Klang Sessions Court against the insured for loss and damages arising from the accident.

**[8]** Subsequent investigations by the respondent revealed that one Noraini bt Mansor had taken over the possession, care and control of motor car MG 7515 after the insured's demise in 2004; the insured was the elder brother of her ex-husband. However, the change of possession of motor car MG 7515 was not followed by a transfer and registration of the change of ownership. The insured was still the registered owner of motor car MG 7515. Noraini bt Mansor had continued renewing the insurance in the name of the insured.

**[9]** On 5 January 2012, the appellant's application to intervene in the proceedings was allowed.

PARTIES' RESPECTIVE SUBMISSIONS

**[10]** Learned counsel for the appellant submitted that the respondent has a statutory liability pursuant to s 96(1) of the RTA 1987 which reads as follows:

> 96(1) If, after a certificate of insurance has been delivered under subsection 91(4) to the person by whom a policy has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph 91(1)(b) (being a liability covered by the terms of the policy) is given against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled the policy, the insurer shall, subject to this section, pay to the persons entitled to the benefit of the judgment any sum payable in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any written law relating to interest on judgments.

**[11]** It was also submitted that the respondent's liability qua insurer was incurred when the accident occurred on 28 September 2007.

**[12]** Learned counsel also argued that the appellant did not know of the fact that the insured had already passed away in 2004. There are two conflicting rights at play; the right of the respondent insurer and the right of the common man. By accepting payments of the premiums, the respondent had affirmed the insurance policy so that it is precluded from repudiating liability. Further, since there is a statutory liability to meet in respect of third party claims, the respondent cannot place any conditions against any third party from making a recovery claim against the respondent for bodily injury to their statutory

liability (see *Tahan Insurance Malaysia Bhd v Ong Choo Tian @ Eng Choo Tian & Anor* [2004] 6 MLJ 367; [2004] 7 CLJ 270). In the circumstances, the right of the common man should prevail and the respondent should be liable to pay to the appellant any amount pursuant to a judgment.

**[13]** Learned counsel further argued that since the accident occurred on 28 September 2007, the accident is now a past event. Further, the respondent's application for the declaration under s 96(3) of the RTA 1987 was made after the accident; it was made after the liability was incurred. As such, it would not be in accordance with s 96(3) of the RTA 1987 for the court to grant a declaration that the insurance is void and unenforceable (see *Kurnia Insurans (M) Bhd v Nik Mohd Faizul bin Nik Mustafa & Anor* [2013] 9 MLJ 675; [2013] 1 LNS 40).

**[14]** Learned counsel, however, conceded that the action in the sessions court had been withdrawn and that the claim is time barred. However, learned counsel argued that should the appeal be allowed and the declaration set aside, then he is prepared to apply for leave to file a fresh writ out of time.

**[15]** In reply, learned counsel for the respondent submitted that the application to the High Court for the declaration was predicated on the ground that there was a non-disclosure of a material fact — that the insured passed away three years prior to the issuance of the insurance policy.

**[16]** Further, the respondent's application for the declaration was granted by the High Court pursuant to s 96(3) of the RTA 1987. Accordingly, the insurance policy is void and unenforceable. The appellant is not without recourse; he is at liberty to institute legal action against Noraini bt Mansor directly. It was also argued that the court should not lend its aid to an unenforceable transaction.

FINDINGS OF THE COURT

**[17]** In this appeal, it is not disputed that at the time of the renewal of the insurance policy the Insured was no longer living. The appellant's case is premised on the argument that the date the liability was incurred is the date of the accident. On the other hand, the respondent's reply is that if the appellant's argument is correct, then they must make their application before the date of the accident. If so, the respondent will be precluded from applying for a declaration if it is subsequently discovered that the policy is voidable or unenforceable for material non-disclosure.

**[18]** Accordingly, the principal issue that falls to be determined is this: Whether the date the liability was incurred is the date of the accident or the date when judgment on liability is pronounced?

**[19]** Subsection (3) of s 96 of the RTA 1987 reads as follows:

> (3) No sum shall be payable by an insurer under subsection (1) *if before the date the liability was incurred*, the insurer had obtained a declaration from a court that the insurance void and unenforceable: Provided that an insurer who has obtained such a declaration as aforesaid in an action shall not thereby become entitled to the benefit of this subsection as respects *any judgment obtained in proceedings commenced before the commencement of that* action unless, before or within seven days after the commencement of that action, he has given notice thereof to the person, who is the plaintiff in the said proceedings specifying the grounds on which he proposes to rely, and any person to whom notice of such an action is so given shall be entitled if he thinks fit to be made a party thereto. (Emphasis added.)

STATUTORY INTERPRETATION

**[20]** In construing a statute, effect must be given to the object and intent of the Legislature in enacting the statute. Accordingly, the duty of the court is limited to interpreting the words used by the Legislature and to give effect to the words used by it. The court will not read words into a statute unless clear reason for it is to be found in the statute itself (see *NKM Holdings Sdn Bhd v Pan Malaysia Wood Bhd* [1987] 1 MLJ 39 (SC); *Metramac Corp Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd* [2006] 4 MLJ 113 (FC); *Vengadasalam v Khor Soon Weng & Ors* [1985] 2 MLJ 449 (SC); and *Sri Bangunan Sdn Bhd v Majlis Perbandaran Pulau Pinang & Anor* [2007] 6 MLJ 581 (FC)).

**[21]** Therefore, in construing any statutes, the court will firstly, look at the words in the legislation and apply the plain and ordinary meaning of the words in the statute. If there is any ambiguity to the words used, the court is duly bound to accept it even if it may lead to mischief. But where the language used is clear and unambiguous, it is not the function of the court to re-write the statute in a way which it considers reasonable. But if the words employed are not clear, then the court may adopt the purposive approach in construing the meaning of the words used (see *Public Prosecutor v Tan Tatt Eek & other appeals* [2005] 2 MLJ 685; [2005] 1 CLJ 713; *Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd* [2002] 1 MLJ 385; [2002] 1 CLJ 645; *Chin Choy & Ors v Collector of Stamp Duties* [1979] 1 MLJ 69; *Yeo Peck Chie v KS Gill & Co* [1946] 1 MLJ 131; *Magor and St Mellons Rural District Council v Newport Corporation* [1952] AC 189 (HL); *Woodward v Watts* (1853) 2 E & B 452; and *Warburton v Loveland d Ivie* (1832) 2 Dow & CI 480 (HL)).

**[22]** In *Manokaram a/l Subramaniam v Ranjid Kaur a/p Nata Singh* [2009]

1 MLJ 21 (FC), Ariffin Zakaria FCJ (later CJ) held that the fundamental rule of interpretation is that a statute is to give effect to the intent of the legislature, and that intention has to be found by an examination of the language used in the statute as a whole. Where the Legislature uses different language in the same connection, in different parts of the statute, it is presumed that a different meaning and effect is intended, and if different language is used in contiguous provisions, it must be presumed to have done so designedly. Where the statute has an ordinary and natural meaning, the court has a duty to enforce that meaning even if the result is inconvenient, impolite or improbable.

**[23]** In *Andrew Lee Siew Ling v United Overseas Bank (M) Bhd* [2013] 1 MLJ 449 (FC), the Federal Court enunciated on the application of s 17A of the Interpretation Acts 1948 and 1967 which provides for a purposive approach in the interpretation of statutes. Zulkefli CJ (Malaya) speaking for the Federal Court had this to say at pp 457–458:

> Section 17A of the Interpretation Acts provides that:
>
> > A construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act of not) shall be preferred to a construction that would not promote the purpose or object.
>
> On the proper application of the provision of the said s 17A of the Interpretation Acts we would refer to the case of *All Malayan Estates Staff Union v Rajasegaran & Ors* [2006] 6 MLJ 97 wherein the court had laid down the principles, inter alia, as follows:
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> In summarising the principles governing the application of the purposive approach to interpretation, *Craies on Legislation* (8th Ed), says at p 566:
>
> (1) *Legislation is always to be understood first in accordance with its plain meaning.*
>
> (2) *Where the plain meaning in doubt the court will start the process of construction by attempting to discover, from the provisions enacted, the broad purpose of the legislation.*
>
> (3) *Where a particular reading would advance the purpose identified, and would do no violence to the plain meaning of the provisions enacted, the courts will be prepared to adopt that reading.*
>
> (4) Where a reading would advance the purpose identified but would strain the plain meaning of the provisions enacted, the results will depend on the context and, in particular, on a balance of the clarity of the purpose identified and the degree of strain on the language. (Emphasis added.)

**[24]** The words 'the date the liability was incurred' in sub-s (3) is not defined in the RTA 1987. In *Littlewood v George Wimpey & Co Ltd British Overseas Airways Corporation (second defendants and third parties)* [1953] 2 All ER 915 at p 921, Lord Denning LJ (as he then was) thought that 'liable' denotes that '...

a person is responsible at law'. Similarly, the *Oxford Companion to Law* explaining the word 'liability' says: 'A person is said to be under a liability when he is, or at least may be, legally obliged to do or suffer something'.

**[25]** According to *Words, Phrases & Maxims — Legally & Judicially Defined*, Anandan Krishnan LexisNexis Vol 10, 'Liability' is defined as responsibility; the state of one who is bound in law and justice to do something where may be enforced by action. Liability may arise from contracts express or implied, or in consequence of torts committed (*Barnett v King* [1891] 1 Ch 4; *Wolmershausen v Gullick* [1893] 2 Ch 514; and *Ellis v Pond and The Bloomsbury Syndicate* [1898] 1 QB 426.

*Meaning of words 'the date the liability was incurred' of sub-s (3)*

**[26]** As a starting point, the proviso to the subsection should be read together with the subsection. Subsection (3) provides that the insurer shall not be liable to pay any sums if 'before the date the liability was incurred' the insurer has obtained a declaration from a court. The proviso to sub-s (3) also provides that the insurer will not benefit from the subsection if the application for the declaration was made 'as respects any *judgment obtained in proceedings commenced before the commencement of the action …*'. Put another way, the proviso provides that the insurer will still be liable if the application for the declaration was only made after judgment was obtained.

**[27]** In our judgment, a reading of the proviso would clearly advance the meaning of 'the date the liability was incurred' and which date is the date when judgment has been obtained.

**[28]** In a running down action, the plaintiff's claim for damages is based on the tort of negligence. Prior to the trial of the action, liability in damages has not yet been incurred. What the plaintiff has is a cause of action in negligence which, if proven, will subject the defendant to liability in damages. Therefore, 'the date liability is incurred' within the meaning of sub-s (3) must be held to have the meaning that liability is only incurred when judgment on liability is pronounced by a court after full trial.

**[29]** In this instant case, no judgment has been obtained; the action having been withdrawn by the appellant with liberty to file afresh. When the application for the declaration by the respondent was filed, there was no judgment. As such, the proviso does not apply to deny the respondent of the benefit of the declaration it had obtained. Consequently, the respondent is entitled to the benefit of the declaration obtained pursuant to sub-s (3) of s 96 of the RTA 1987.

**[30]** For the foregoing reasons, we are unable to agree with the findings of the learned judge in the High Court in *Kurnia Insurans (M) Bhd v Nik Mohd Faizul bin Nik Mustafa & Anor*.

Accordingly, the appeal was dismissed with no order as to costs.

*Appeal dismissed with no order as to costs.*

Reported by Kanesh Sundrum